No. 452

In the Supreme Court of the United States

OCTOBER TERM, 1944

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LE TOURNEAU COMPANY OF GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 91–93) is reported in 143 F. (2d) 67. The findings of fact, conclusions of law, and order of the Board (R. 33–46) are reported in 54 N. L. R. B. 1253.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 23, 1944 (R. 94). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether, when no other feasible means of distributing union literature is available, the Board could properly find that the Company by promulgating and enforcing a rule prohibiting the distribution of printed matter on its property, in so far as it prohibited employees from distributing union handbills on its parking lots, interfered with the exercise of the rights guaranteed employees under Section 7 of the Act, in violation of Section 8 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151 *et seq.*) are set out in the Appendix, pp. 46–47, *infra*.

STATEMENT

Upon the usual proceedings the Board, on February 12, 1944, issued its findings of fact, conclusions of law and order (R. 33–46). The pertinent facts, as found by the Board and as shown by undisputed evidence, may be summarized as follows:[1]

Le Tourneau Company of Georgia, a Georgia corporation, hereinafter called the Company, is a manufacturer of earth-moving machinery and

[1] In the following statement references preceding a semicolon are to the Board's findings, those following are to the supporting evidence. References to the typewritten transcript of testimony are indicated by the symbol "Tr."

other products, and employs more than 2,100 persons at its plant, near Toccoa, Georgia (R. 35–36; 14–15, 54). The plant site is part of a 6,000-acre tract of land, owned by the Company or its subsidiary (R. 36; 54), and extends in its entirety along the northerly side of U. S. Highway 13 (R. 36; 54–55, 56–57, Tr. 13).[2] It is divided into 2 sections by a roadway that intersects the highway (R. 36; 56–57). A 6-foot wire fence, roughly paralleling the highway, but set back at distances varying from 30 to 100 feet from the highway (R. 36; 55, 56), encloses each section of the plant (R. 36; 55, 56). Virtually all of the employees, irrespective of the side of the roadway upon which they work, enter and leave the plant through a main gate which adjoins an office building that serves as a section of the fence (R. 36; 55, 56, 57, 58, 79).[3] This gate is set back from the highway 100 feet (R. 36, 42; 56); the company-owned ground between the office building and the highway (R. 36; 76), is paved with concrete (R. 36; 56–57). This concrete apron and a connecting gravel plot, together called the North parking lot, extend along the highway for 150 feet (R. 36;

[2] Adjacent to the plant, but on the southerly side of Highway 13, is a hamlet owned by the Company, known as Tournapull, consisting of a United States Post Office, a gasoline station, and about 50 houses, which are occupied by employees of the Company (R. 36; 54–55). Toccoa is about 3 miles distant from Tournapull (R. 36; 54).

[3] The time clocks are inside the gate (R. 36, n. 3; 58).

55–56, 57, Tr. 108). On the opposite side of the highway is another parking lot, hereinafter called the South parking lot, which is leased by the Company (R. 37; 55, 58–59, 71, 74, 75–76, Tr. 106–108). Both lots are guarded and kept clean by the Company's plant-protection force (R. 37; 58, 74, 75, 81–82).

Most of the employees live in widely scattered communities and on farms within a radius of 20 miles of the plant (R. 36, 42; 55, Tr. 78). They travel to and from work by automobile or bus (R. 36–37, 42; 55, 56, 58, 59, 60–61, 77). The conveyances in which about 60 percent of them travel are parked on the North lot; most of the others are parked on the South lot (R. 36–37; 58–59, 60–61).

Since July 1941, the Company has strictly enforced a rule prohibiting all persons from distributing printed matter of any kind on its property without permission (R. 37–38; 74–75, 80–82, 83, 90).[4] In February 1943, the Congress of Industrial Organizations, hereinafter called the C. I. O., began to organize the Company's employees, and on April 8, 1943, the Board held an election at the plant, which the C. I. O. lost (R.

[4] Before the rule was promulgated, merchants from nearby towns employed boys to place advertisements in the parked automobiles, a practice that had resulted in littering (R. 37; 80–81, 76). Thefts from the automobiles had also occurred from time to time before the rule was adopted (R. 37; 80–81, 79).

38; 61–62, Tr. 38–39). On the day of the Board election, employee Grady Ferguson, after completing his day's work, boarded a bus standing on the North parking lot (R. 38; 72–73, Tr. 82). On entering the bus, Ferguson found a few C. I. O. leaflets, some of which he gave to fellow passengers, and others of which he handed through an open window to persons on the parking lot (R. 38; 72–73). The Captain of the Plant Guard saw the incident, and instructed Ferguson to report to the plant manager the next day (R. 38; 73); the Plant Manager suspended Ferguson from work for 2 days because of his violation of the "no-distribution" rule (R. 38–39; 73).

After the defeat of the C. I. O., the Union undertook to organize the Company's employees (R. 38; 62–63). On July 15, 1943, employee L. Wayman Ayers, president of the local union, asked for permission to distribute handbills in and about the plant announcing a Union meeting, but the Plant Manager denied his request (R. 39; 63–64). The next day, Ayers distributed a few union handbills on the South parking lot during his lunch hour, in the mistaken belief that this lot did not belong to the Company (R. 39; 63–65, 68–69, 70, 84–85, Tr. 44, 72–73). A plant guard observed his actions, which were ultimately

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[5] United Steelworkers of America, affiliated with the C. I. O., the labor organization that filed the charges in this proceeding (R. 34; 8–9).

reported to the General Manager (R. 39; 84–85, 65, 66). The latter suspended Ayers for 2 days because of his violation of the "no-distribution" rule (R. 39; 63, 65–66, 14–15).

Upon the foregoing facts the Board concluded that although the "no-distribution" rule had "been applied to all persons, without exception, seeking to distribute literature on the parking lots" (R. 40), the Company, "in applying its 'no-distributing' rule to the distribution of union literature by its employees on its parking lots * * * placed an unreasonable impediment on the freedom of communication essential to the exercise of its employees' right to self-organization, * * *" (R. 43).[2]

The Board pointed out that because of the circumstances under which the employees worked and lived, and the location and surroundings of the Company's plant, distribution of union literature to employees at places other than the Company's property was virtually impossible (R. 41–42; compare, R. 66–67). After emphasizing the serious detrimental impact of the rule upon the employees' freedom of self-organization, the Board turned to a consideration of the possible detriment to the employer's interests which would flow from

[2] The Board found that the rule had not been discriminatorily enforced against Ferguson and Ayers for the purpose of discouraging union membership and activity (R. 39–40).

abrogation of the rule as applied to the parking lots. The Board recognized that the Company had a legitimate interest in preventing littering, but found that under the facts of this case that interest did not justify the rule (R. 40, 42). The Board noted that littering on a parking lot is not as serious to an employer as would be littering "within buildings where production is being carried on * * *" (R. 42; 78, 71–72), and that the Company had no general rule against littering (R. 42; 78–79, Tr. 121–122). In answer to the contention that the rule was designed to prevent thefts, the Board found (R. 42–43; 79, Tr. of oral argument before the Board, 33) that thefts had ceased when outsiders were denied access to the lots and that in any event the rule could have no bearing upon that problem because under the rule the employees continued to have free access to the lots (R. 42–43). In answer to the Company's final contention—namely, that the rule lessened the likelihood of employees bringing literature into the plant itself—the Board pointed out that the Company has no rule against employees carrying newspapers or other printed matter into the plant, and that it places copies of a magazine in boxes near the plant gate, which the employees can take with them into the plant (R. 43; 59–60, 77).

The Board concluded that since the rule, as applied to the distribution of union literature on the

parking lots, was not necessary to protect any legitimate employer interest, and its enforcement deprived employees of the only practical opportunity to enjoy their rights under the Act the rule was inconsistent with the statutory policy (R. 40–43). The Board further concluded that the Company, by applying its no-distribution rule to the distribution of union literature by its employees on its parking lots, engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (R. 71) and by suspending Ferguson and Ayers for violations of the rule, discriminated in regard to their hire and tenure of employment in violation of Section 8 (3) of the Act (R. 43, 45).

The Board ordered the Company to cease and desist from its unfair labor practices; to make Ferguson and Ayers whole for the wages they lost during their respective two-day suspensions; to rescind the rule insofar as it prohibits distribution of union literature by employees in the parking lots; and to post appropriate notices (R. 45–46). On February 24, 1944, the Company petitioned the court below to set aside the Board's order (R. 1–5). Thereafter the Board, answering the Company's petition, requested that its order be enforced (R. 5–8). On June 23, 1944, the court below handed down its opinion and entered a decree setting aside the Board's order in its entirety (R. 91–94).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding, as a matter of law, that the Company's application of its "no distribution" rule to prevent the distribution of union literature by employees on parking lots did not interfere with its employees' exercise of the rights guaranteed them in Section 7 of the Act.

2. In holding without qualification that there is "no provision, express or implied, in the National Labor Relations Act which requires an employer to permit organization efforts [by his employees] on his premises" (R. 93), and that an employer may therefore insist "that the employees discuss and act on the matter of their own organization elsewhere than on the employer's property" (*id.*).

3. In holding that the issue presents a question of law for the court to decide for itself and in failing to give any weight to the Board's determination that in the instant circumstances, the application of the rule to employee conduct on the parking lots constituted interference in violation of Section 8 (1) of the Act.

4. In holding that the suspension of Ferguson and Ayers for having violated the rule did not constitute discrimination respecting hire and tenure of employment violative of Section 8 (3) of the Act.

5. In setting aside and denying enforcement to the Board's order.

SUMMARY OF ARGUMENT

The suspension from employment of Ferguson and Ayers as a penalty for distributing union handbills was violative of Section 8 (3) and (1) of the Act unless the Company was privileged to prohibit its employees from engaging in such activities. The Board found that the Company's rule prohibiting the distribution of union literature on its parking lots was itself violative of Section 8 (1) of the Act and that the rule consequently could not justify the suspensions. Although a literal reading of Section 8 (1) would seem to render illegal all plant rules which tended to interfere with union activities protected in Section 7, the Board, in construing the statute, has sought to harmonize the employee interests which the statute protects with competing proprietary interests of employers. The Board recognizes that employees must have available adequate channels of communication for the receipt and transmittal of organizational information both oral and written in order that they may exercise the rights guaranteed them under the Act. It recognizes on the other hand that solicitation of union members or distribution of union literature on plant premises is sometimes injurious to legitimate employer interests. Therefore, where an employer seeks to justify a rule prohibiting self-organizational activities on his premises, the Board balances the extent of the injury which the employer would sustain if the rule were abrogated

against the extent of the injury to the organizational interests of the employees which the rule imposes, and in its decision seeks to protect to as great a degree as possible the legitimate interests of both.

The Board has held that an employer is justified in prohibiting union solicitation during working hours. And where other adequate methods of distributing union literature to employees are available, the Board has held that an employer's interest in maintaining plant cleanliness justifies a rule prohibiting the distribution of union literature within the plant. Where no other adequate channels of distribution are available, however, the Board must decide whether the injury to the employer's legitimate interests is sufficiently serious to justify frustration of the employees' rights by denying to them the use of the employer's property. In the instant case the Board found that to deny the employees the right to distribute union literature on the parking lots would, because of the circumstances under which they work and live, make it practically impossible for them to realize the benefits of the Act. It found further that to permit the distribution of union literature on the parking lots would impose little, if any, detriment upon legitimate interests of the employer, and that the employer remained free completely to protect his interests by methods which did not adversely affect the rights of the employees.

ARGUMENT

The Board properly found that application of the company's "no-distribution" rule to prevent the distribution of union literature by employees on parking lots interfered with the exercise of rights guaranteed in Section 7 and violated Section 8 (1) of the Act

It is undisputed that the Company suspended Ferguson and Ayers as a penalty for distributing union handbills. Since an employer engages in discrimination within the meaning of Section 8 (3) of the Act whenever he discharges, refuses to hire, or otherwise punishes an employee for engaging in union activities which are protected by Section 7 of the Act (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 346–347; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 129; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 183, 185), the suspension of these two employees was unlawful unless the Company was privileged to prohibit its employees from engaging in the particular union activities involved.

Section 7 of the National Labor Relations Act declares that employees "shall have the right to self-organization, to form, join, or assist labor organizations * * *." Section 8 of the Act provides that "it shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." A literal reading of this section would indicate that any em-

ployer action which tends to obstruct or impede self-organizational activities falls within the statutory ban. So read, the statute would, of course, require abrogation of all plant rules which curtailed union solicitation on plant premises. But the Board has recognized that the statutory prohibition of interference, though absolute in terms, should be so construed as to harmonize, to the greatest possible extent, the employee interests which the statute seeks to protect with competing proprietary interests of employers (R. 40–41).[1]

The Board's approach thus follows closely that adopted by this Court in reconciling individual interests with community interests which demand curbs upon individual freedom. Governmental restraints upon freedom of communication give

[1] Compare the statement of the United States Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board v. Valley Service Oil Co.*, 122 F. (2d) 149, 152: "It may be argued that Section 8 of the Act forbids any interference whatever with the right of the employees to bargain collectively—in other words, that inconvenience and loss which may be occasioned to respondents by giving the Union representatives access to their ships has no bearing upon the rights of the seamen, which are guaranteed under Section 7. It would seem that a reasonable construction of the statute need not be as sweeping as this. Doubtless *interference must not be so substantial as to preclude the reasonable exercise of the employees' rights* but in determining what is a reasonable opportunity to bargain through chosen representatives we think *the Board may weigh the inconvenience, risk or damage imposed upon the employer against any mere convenience to the Union of access to the vessel.* The Board has done this and in our opinion reached a conclusion based upon substantial evidence." [Italics supplied.]

rise to the necessity, illustrated in *Martin* v. *Struthers*, 319 U. S. 141, 143, "of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens."

The right of employees to urge the advantages of self-organization, to proselytize and solicit members on behalf of labor organizations, and their correlative right "to receive aid, advice, and information from others"[*] concerning labor organizations, which the Act protects, are among the "fundamental rights" secured against governmental infringement by the First and Fourteenth Amendments. *Hague* v. *C. I. O.*, 307 U. S. 496, 510. Cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 101–104. By protecting those basic rights from infringement by employers Congress sought to remove the primary and long standing source of obstructions to their exercise and thus to create conditions indispensable to the attainment of the statutory objectives. As the Board noted in the

[*] In *Matter of Harlan Fuel Co.*, 8 N. L. R. B. 25, 32, the Board stated: "The rights guaranteed to employees by the Act include full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment." See also, *Matter of Weyerhaeuser Timber Co.*, 31 N. L. R. B. 258, 264–265; *Matter of American Cyanamid Co.*, 37 N. L. R. B. 578, 585–586, 588; *Matter of Ozan Lumber Co.*, 42 N. L. R. B. 1073, 1079–1081.

instant case (R. 41), "employees cannot realize the benefits of the rights to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization." Therefore, whenever an employer blocks an effective avenue for communication of organizational information by promulgation or application of a plant rule, the Board must, to adapt the words of this Court, "be astute to examine the effect" of the employer's rule and "to weigh the circumstances and * * * appraise the substantiality of the reasons advanced in support [of it]." *Schneider* v. *State*, 308 U. S. 147, 161. Such an appraisal led the Board to conclude in the *Peyton Packing* case, 49 N. L. R. B. 828, 843–844, enforced on other grounds, 142 F. (2d) 1009 (C. C. A. 5), certiorari denied, October 9, 1944, No. 298, this Term, that in the absence of special circumstances an employer could prohibit union solicitation within the plant during working time but not during non-working time. This problem is now before the Court in *Republic Aviation Corp.* v. *National Labor Relations Board*, No. 226, this Term.

The right of employees to communicate organizational information encompasses communication

by means of the written as well as the spoken word. The Board pointed out that "speech is not the only mode of communication by which self-organization is effected, nor is it sufficient that this channel alone be free. Effective organization requires the use of printed literature and of application and membership cards, and these modes of communication are also protected by the Act" (R. 41). The Act, like the Constitution, "embraces the right to distribute literature, *Lovell* v. *Griffin*, 303 U. S. 442, 452, and necessarily protects the right to receive it." *Martin* v. *Struthers*, 319 U. S. 141, 143; *Jamison* v. *Texas*, 318 U. S. 413, 416. This Court has had occasion to note that "pamphlets have proved most effective instruments in the dissemination of opinion," *Schneider* v. *State*, 308 U. S. 147, 164; *Lovell* v. *Griffin*, 303 U. S. 444, 452; and that their distribution is essential to the cause of employee organization. *Martin* v. *Struthers*, 319 U. S. 141, 145–146.

Door-to-door distribution of leaflets, the method considered by this Court in the *Struthers* case, can be effectively utilized by labor organizations only where the homes of the workers involved are practically contiguous, for example, in company towns or in communities where the workers' homes are clustered about the plant. The obvious practical hardships which would attend any attempt to distribute literature to the homes of employees scattered throughout a large city or

over a wide rural area are enormously increased in wartime by transportation difficulties. When door-to-door distribution is impractical, employee organizations must rely heavily upon distribution at plant gates if they are to get printed matter into the hands of the employees.[*] If employees upon leaving the plant step out onto a public street or highway, utilization of the employer's property for the purpose of distributing organizational literature is not, of course, indispensable to the full exercise of their rights under the Act. Therefore, under such circumstances, where the distribution of union literature on company property would impose any "inconvenience, risk or damage" (*National Labor Relations Board v. Cities Service Oil Co.*, 122 F. (2d) 149, 152 (C. C. A. 2)) upon the employer, the Board finds

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[*] Weyforth, William O., *The Organizability of Labor* (1917), p. 16; Walsh, Raymond F., *C. I. O. Industrial Unionism In Action* (1937), pp. 69, 131, 169, 170; International Ladies' Garment Workers' Union, *Handbook of Trade Union Methods* (1937), p. 11; Brooks, R. R., *When Labor Organizes* (1938), p. 10; Brooks, R. R., *As Steel Goes* (1940), p. 117 and accompanying photograph. See also, *Matter of Karp Metal Products Co., Inc.*, 42 N. L. R. B. 119, 134–135, enforced, 134 F. (2d) 954 (C. C. A. 2); *Matter of Revlon Products Corp.*, 48 N. L. R. B. 1202, 1207–1208, enforced 144 F. (2d) 88 (C. C. A. 2); *Matter of Wells-Lamont-Smith Corp.*, 42 N. L. R. B. 440, 448; *Matter of Kohen-Ligon-Eglz, Inc.*, 36 N. L. R. B. 1294, 1299–1300, enforced, 128 F. (2d) 502 (C. C. A. 5); *Matter of Paragon Die Casting Co.*, 27 N. L. R. B. 878, 881, 883, 886. See *Republic Aviation Corp.* v. *National Labor Relations Board*, No. 226, this Term, transcript of record, p. 66.

that protection of the statutory interests of employees does not require that such distribution be permitted. This was the situation in *Matter of Tabin-Picker & Co.*, 50 N. L. R. B. 928. In that case, although the plant was located in a large city, Chicago, and house-to-house distribution was not feasible, there were no special circumstances which made it difficult or impossible to distribute organizational literature to the employees on the street as they left the building. The employer prohibited the distribution of literature within the plant, and thereafter discharged an employee who in violation of the rule distributed handbills announcing a union meeting. The Board held that the employer's conduct was not in violation of the Act and stated, "In the interest of keeping the plant clean and orderly it is not unreasonable for an employer to prohibit the distribution of literature on plant premises at all times." 50 N. L. R. B. at 930.[10]

On the other hand, if an employer interferes with the distribution of union literature on the

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[10] Accord, *Matter of North American Aviation, Inc.*, 56 N. L. R. B. 959; *Matter of Goodyear Aircraft Corporation*, 57 N. L. R. B. 502. In the latter case the Board, upholding an employer's prohibition of the distribution of union membership cards "within the plant, where production is being carried on," said: "We are not convinced that, under the circumstances disclosed here, the protection of the respondent's interest in maintaining plant cleanliness is outweighed by the interest of its employees in engaging in the type of activity banned by the respondent as a tactic in union organization." But cf. *Matter of Sledge Mfg. Co.*, 58 N. L. R. B., No. 232.

street in front of his plant (*Matter of Spalek Engineering Company*, 45 N. R. B. 1272, 1276–1279; *Matter of Revlon Products Corp.*, 48 N. L. R. B. 1202, 1203, 1209–1212, enforced, 144 F. (2d) 88 (C. C. A. 2); *Matter of Paragon Die Casting Co.*, 27 N. L. R. B. 878, 881, 886) or at the homes of his employees, his conduct is unquestionably violative of the Act.

Often, because of geographic or other circumstances under which employees work and live, organizational information cannot be placed in their hands at places other than the employer's property. For example, employees who work and live in company towns or on board ship can be approached only on the employer's property. Frustration of the organizational rights of such employees by the promulgation and enforcement of rules prohibiting union activity on the employer's premises or by the denial of access to the employer's property to union organizers was a familiar phenomenon prior to the passage of the National Labor Relations Act.[11] After passage

[11] U. S. Commission on Industrial Relations, Final Report of Commission * * * Vol. 1 (1916), pp. 78–79; U. S. Coal Commission, *Labor Relations in Bituminous Mining*, part 3 (1925), p. 1331; *The Company Town*, submitted to the United States Coal Commission by the Bituminous Operators Special Committee, Sept. 8, 1923; Fitch, John A., *The Causes of Industrial Unrest* (1924), pp. 189–191, 197, 206; Encyclopedia of Social Sciences, *Mining-Labor*, by Isador Lubin, Vol. 10 (1935), p. 501; Hinrichs, A. F., *The United Mine Workers of America and the Non-Union Coal Fields* (1923), p. 63;

of the Act the Board and the courts recognized that the rights there guaranteed were invaded by employers who utilized their control over property in this manner.[2] The Board and the courts

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Mitchell, George Sinclair, *Textile Unionism and the South*, University of North Carolina Press (1931); *Seamen's Journal*, April 4, 1934, p. 55; Paul F. Brissenden, *Employment System of the Lake Carriers' Association*, Bureau of Labor Statistics, Bull. No. 235 (1918), pp. 24–25; Chafee, Zachariah, *The Inquiring Mind*, New York, Harcourt Brace (1928), pp. 17–176; U. S. Commission on Industrial Relations, *Report on the Colorado Strike*, by George P. West (1915), pp. 15, 58; Annual Report of the Department of Labor (1913), pp. 21–22; Annual Report of the Department of Labor (1917), p. 32; "The Steel Strike" in *Monthly Labor Review*, by Mrs. M. A. Gadsby, Dec. 1919, pp. 83, 91; Davis, H. B., *Company Towns*, Encyclopedia of Social Sciences, Vol. 4 (1931), p. 121; U. S. Senate, *West Virginia Coal Fields*, *Report* No. 457, 67th Cong., 2d sess. (1922); U. S. Bureau of Labor Statistics, *National War Labor Board* (1923), Bull. No. 287, p. 29; U. S. Coal Commission, *Labor Relations in Bituminous Mining*, part I (1925), p. 156.

[2] In its Sixth Annual Report the Board said: "In industries where the employees must spend virtually all of their time upon the employer's property, it is apparent that the employer can effectively prevent their enjoyment of these rights by denying union representatives access to its property. The Board has accordingly held that the exclusion of union representatives from the employer's property under such circumstances constitutes 'serious interference' with the exercise of the rights guaranteed in Section 7." National Labor Relations Board, *Sixth Annual Report* (Gov't Print. Off., 1942), pp. 43–44. Among the cases so holding are the following: *Matter of Harlan Fuel Co.*, 8 N. L. R. B. 25, 31–32, 63 (employees living in company town denied access to union representative); *Matter of West Kentucky Coal Co.*, 10 N. L. R. B. 88, 105–106, 133 (*idem*), enforced, 116 F. (2d) 816 (C. C. A. 6); *Matter of American Cyanamid Co.*, 37 N. L. R. B. 578, 585–586, 588 (segregation of white and

have uniformly held that rules barring employee organizational activities on company premises which are either adopted, or applied discriminatorily, for the purpose of impeding self-organization, are violative of the Act.[18] But, although plant rules which discriminate against union solicitation or the distribution of union literature (e. g., rules which permit solicitation for all causes except unions, or which permit distribution of all types of literature except union literature) are, like laws which discriminate against freedom of speech, by that token alone rendered invalid, proof of non-discrimination does not, in either case

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colored employees in company town used to prevent interchange of union information); *Matter of Ryan Lumber Co.*, 42 N. L. R. B. 1073, 1079–1081, 1084 (*idem*); *Matter of Weyerhaeuser Timber Co.*, 31 N. L. R. B. 258, 264–267, 270 (employees living in company owned logging camp denied access to union representatives); *Matter of Waterman Steamship Corp.*, 7 N. L. R. B. 237, enforced, 309 U. S. 206, 224–226 (employees living aboard ship denied access to union representatives); *Matter of Cities Service Oil Co.*, 25 N. L. R. B. 36, 57 (*idem*), enforced, (122 F. (2d) 149, 152 (C. C. A. 2); *Matter of Richfield Oil Corp.*, 49 N. L. R. B. 593 (*idem*), enforced, 143 F. (2d) 860 (C. C. A. 9); *Matter of Seas Shipping Co.*, 4 N. L. R. B. 757 (*idem*).

[18] *National Labor Relations Board* v. *William Davies Co.*, 135 F. (2d) 179, 181 (C. C. A. 7), certiorari denied, 320 U. S. 770 (discriminatory promulgation of no-solicitation rule); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. (2d) 714, 716–717 (C. C. A. 8) (*idem*); *Matter of Sledge Mfg. Co.*, 58 N. L. R. B., No. 232 (discriminatory promulgation of rule prohibiting distribution of "handbills or cards"); *National Labor Relations Board* v. *Denver Tent & Awning Co.*, 138 F. (2d) 810, 811 (C. C. A. 10) (discrimina-

establish their legality. Just as a state law "certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them

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tory promulgation and enforcement of no-solicitation rule); *National Labor Relations Board* v. *Peyton Packing Co.*, 142 F. (2d) 1009, 1010 (C. C. A. 5), certiorari denied, October 9, 1944, No. 298, this Term (*idem*); *National Labor Relations Board* v. *M. E. Blatt Co.*, 143 F. (2d) 268, 271–273 (C. C. A. 3), certiorari denied, November 13, 1944, No. 553, this Term (*idem*); *National Labor Relations Board* v. *Kohen-Ligon-Folz, Inc.*, 128 F. (2d) 502, 503 (C. C. A. 5), enforcing 36 N. L. R. B. 1294, 1299–1303 (discriminatory application of rule prohibiting distribution of literature on plant premises); *Matter of Jensen Radio Mfg. Co.*, 27 N. L. R. B. 813, 830–831 (*idem*); *National Labor Relations Board* v. *Glenn L. Martin Nebraska Co.*, 141 F. (2d) 371, 372 (C. C. A. 8) ~~(discriminatory application of rule prohibiting distribution of literature on plant premises); *Matter of Jensen Radio Mfg. Co.*, 27 N. L. R. B. 813, 830–831 (*idem*); *National Labor Relations Board* v. *Glenn L. Martin Nebraska Co.*, 141 F. (2d) 371, 372 (C. C. A. 8)~~ (discriminatory application of no-soliciting rule; *National Labor Relations Board* v. *Columbia Products Corp.*, 141 F. (2d) 687, 688 (C. C. A. 2) (discriminatory application of no-visiting rule); *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 112 F. (2d) 657, 659–660 (C. C. A. 2), affirmed, 312 U. S. 660 (discriminatory refusal to permit one of two contesting unions to use company premises for holding meetings); *Matter of Wallace Mfg. Co.*, 2 N. L. R. B. 1081, 1085, 1090, 1093, enforced, 95 F. (2d) 818, 820 (C. C. A. 4) (*idem*); *Matter of Berkshire Knitting Mills*, 46 N. L. R. B. 955, 966–968, 977, enforced, 139 F. (2d) 134, 139 (C. C. A. 3), certiorari denied, 322 U. S. 741 (*idem*); *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 225–226 (discriminatory refusal to issue shipboard passes to union representative); *South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. (2d) 480, 482–483 (C. C. A. 5) (*idem*), certiorari denied,

all alike,"[14] so an employer's rule does not acquire immunity from the statutory injunction against interference because it classifies union literature along with types of printed matter which have no specific statutory protection and bans the distribution of all alike. This and other Courts have held that the Act is violated whenever an employer engages in conduct which tends to interfere with the free exercise of rights guaranteed to employees by the statute, even though the employer is not motivated by anti-union animus and does not intend by his conduct to violate the Act.[15]

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313 U. S. 582; *National Labor Relations Board* v. *Gallup American Coal Co.*, 131 F. (2d) 665, 667 (C. C. A. 10) (discriminatory denial of sign posting privileges on company premises).

[14] *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115.

[15] Absence of illegal motive or intent is no more determinative of the validity of the employer's conduct than is absence of intent to violate the Constitution determinative of the validity of legislation which is alleged to infringe constitutionally guaranteed civil rights. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 520–521; *National Labor Relations Board* v. *Whittier Mills Co.*, 123 F. (2d) 725, 727 (C. C. A. 5); *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 593 (C. C. A. 7); *National Labor Relations Board* v. *Burry Biscuit Corp.*, 123 F. (2d) 540, 543 (C. C. A. 7); *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. (2d) 528, 532, 533 (C. C. A. 6); *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9); *National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F. (2d) 149, 152 (C. C. A. 2); *Republic Aviation Corp.* v. *National Labor Relations Board*, 142 F. (2d) 193, 196 (C. C. A. 2), certiorari granted.

Where the only practical method of distributing union literature to employes depends upon utilization of the employer's property, the Board is called upon to decide whether such activity would impose upon the employer a detriment so severe as to justify prohibition of the distribution and consequent frustration of the employees' rights under the Act (R. 41–43). In the instant case the Board first considered the extent to which the Company's rule, insofar as it prohibited distribution of union literature by employees on the parking lots, deprived them of "the freedom of communication which is essential to the exercise of the right to self organization" (R. 41). The Board found that:

> * * * respondent's plant is located in the country in the heart of 6,000 acres of land owned by it or its subsidiary. Apart from U. S. Highway No. 13 (and perhaps the intersecting road), the respondent and its subsidiary own all the land adjacent to the plant. This, in itself, seriously limits

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October 9, 1944, No. 226, this Term; *South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. (2d) 480, 482 (C. C. A. 5), certiorari denied, 313 U. S. 582; *National Labor Relations Board* v. *Gluck Brewing Co.*, 144 F. (2d) 847, 851–854 (C. C. A. 8); *Richfield Oil Corp.* v. *National Labor Relations Board*, 143 F. (2d) 860, 862 (C. C. A. 9); *National Labor Relations Board* v. *Engineering & Research Corp.*, decided October 12, 1944 (C. C. A. 4); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565; *American Smelting & Refining Co.* v. *National Labor Relations Board*, 126 F. (2d) 680, 685 (C. C. A. 8).

> the possibilities of effectively communicating with the bulk of the respondent's employees. This limitation would not, however, be too restrictive if the respondent's gate opened directly onto the highway; for then persons could stand outside the respondent's premises and distribute literature as each employee entered or left the plant. But at the respondent's plant the gate is 100 feet back from the highway, on company property. Over 60 percent of the respondent's employees, after passing the gate, enter automobiles or buses parked in the space between the gate and the highway [i. e. the North parking lot], and presumably speed homeward, without ever setting foot on the highway. Distribution of literature to employees is rendered virtually impossible under these circumstances, and it is an inescapable conclusion that self-organization is consequently seriously impeded (R. 41–42).

The Board further found that because "the employees' homes are scattered over a wide area," house-to-house distribution of literature was highly impracticable (R. 42), and that "In the absence of a list of names and addresses, * * * direct contact with the majority of the respondent's employees away from the plant would be extremely difficult" (R. *id.*). Here then, since the bulk of employees do not upon leaving the plant step out into a public street or highway, essential organizational literature can be dis-

tributed to them in the normal fashion only if the would-be distributors are permitted to use the parking lots (R. 42, 66–67).[16]

After emphasizing that enforcement of the Company's rule under these circumstances foreclosed a vital avenue of communication and made it virtually impossible for the Company's employees to "realize the benefits of the right to self-organization guaranteed them by the Act" (R. 41; cf. *Matter of Republic Aviation Corp.*, 51 N. L. R. B. 1186, 1193, enforced, 142 F. (2d) 193, certiorari granted, October 9, 1944, No. 226, this Term), the Board proceeded to consider the possible detriment to the Company's interests which would result from abrogation of the rule as applied to the parking lots. The Company contended first that its rule was necessary to prevent the littering of its parking lots. The Board recognized that the Company had a legitimate interest in preventing littering but it found that the danger of littering neither necessitated nor justified a rule precluding distribution of union literature on the parking lots. It pointed out that the

[16] The only practical alternative to distribution on the parking lots would be distribution within the plant itself. Since, as the Board pointed out in the *Tabin-Picker* case, *supra*, distribution of union literature within a production plant would be likely to impose some detriment upon the employer, the Board did not order the Company to permit such distribution within the plant. Whether, if no alternative method of distribution were available, the Board would order an employer to permit distribution of literature within the plant would depend upon its appraisal of the benefit-prejudice considerations set out below.

littering of parking lots is by no means as serious to an employer as would be littering "within buildings where production is being carried on * * *" (R. 42; 78, 71–72). The necessity of cleaning litter from parking lots, like the necessity of cleaning it from city streets, is at most a "minor nuisance." *Martin* v. *Struthers*, 319 U. S. 141, 143. But the Board's order, as it noted, does not require the Company to bear even this minor burden, since it does not deprive the Company of the power to prevent the littering of its parking lots (R. 42). The same "obvious methods of preventing littering" (*Schneider* v. *State*, 308 U. S. 147, 162) which may result from the distribution of printed matter are open to an employer as are open to a municipality which wishes to keep its streets clean. "Amongst these is the punishment of those who actually throw papers" on the parking lots. The best way to prevent littering, as the Company's plant manager in effect conceded at the hearing (Tr. 121–122), is to make a rule against littering. This Court's holding that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it * * *": (*Schneider* case, 308 U. S., at p. 162), is paralleled by the Board's conclusion in the instant case that an employer's similar purpose does not justify a rule which prohibits an employee who is rightfully and necessarily on the

parking lot from there handing union literature to those of his fellows who are willing to receive it.

The Company's second contention, that its rule is necessary in order to prevent literature from being brought into the plant where it might allegedly interfere with efficiency and endanger the safety of machines and employees, was rejected by the Board as without merit. The Board pointed out that the Company does not attempt to prevent employees from bringing newspapers or other reading matter into the plant; in fact, the Company places copies of its magazine in boxes near the plant gate, which employees can take with them into the plant (R. 43). It is evident, therefore, as the Board found (*id.*), that the Company does not sincerely fear that the distribution of literature on its parking lots would have any appreciable effect upon the efficiency and safety of operations within the plant. Even if such a danger did exist, it could easily be met within the framework of the Board's order. As the Board pointed out a "rule barring the carrying of literature * * * into the plant * * * would provide a better safeguard against the impairment of efficiency and safety in the plant than a rule directed at distribution, and would not be subject to the same objections." (R. 43).

The Company's final contention that the rule is necessary to prevent thefts from automobiles

left on its parking lots, is manifestly untenable. Thefts, which had occurred while the Company permitted non-employees to distribute commercial advertisements on the parking lots (R. 37; 80–81), admittedly ceased when access to the lots was denied to outsiders and guards were stationed on the lots (R. 33, 79; Tr. of oral argument before the Board, 33). The Company's no-distribution rule can have no tendency to prevent thefts by employees since, as the Board found, they are allowed "free access to the lots in any event" (R. 42). Insofar as the rule tends to prevent thefts by outsiders it remains precisely as effective after the Board's order as before; the order does not require the Company to grant access to its parking lots to outsiders, having no legitimate business on its premises.[17]

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[17] The facts in the instant case do not present and the Board did not consider the question which would arise if union representatives who were not employed at the plant sought to distribute literature on the parking lots. The same benefit-prejudice considerations which the Board deemed controlling in this case must be applicable to such a situation, and the consistent holdings of the Board and the courts that an employer may not deny access to his property to union representatives when access is necessary to enable the employees to exercise their rights under the Act intelligently (n. 12, pp. 20–21, *supra*), would indicate that, subject to whatever safeguards may be appropriate (Cf. *Martin* v. *Struthers*, 319 U. S. 141, 143); union representatives, no less than employees, should be permitted to distribute literature on the parking lots (Cf. Brief for the United States as Amicus Curiae in *R. J. Thomas* v. *Collins*, No. 14, this Term, pp. 14–15, 28–29, 34–36).

The Company's assertion that if it were required to permit its employees to distribute union literature on the parking lots it could not "rightfully deny to other members of the public and other employees the right to distribute other literature" (Company's brief in the court below, p. 6) is based on a *non sequitur*. The requirement that an employer fulfill his statutory obligation of non-interference with the dissemination of self-organizational information by employees and their representatives no more prevents him from prohibiting the dissemination of other types of printed matter by either employees or the public at large than does the constitutional requirement that governmental agencies refrain from infringing upon freedom of the press prevent them from restricting the distribution of commercial handbills. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111; *Valentine* v. *Chrestensen*, 316 U. S. 52, 54–55; *Schneider* v. *State*, 308 U. S. 147, 165. (Cf. pp. 20–23, *supra*.)

The most significant reason offered by the Company for the application of its no-distribution rule to union literature appears clearly from the following statement in its brief in the court below (p. 6): "since an election was held the result of which was against the Union * * * distribution of [union] literature pro and con would necessarily engender strife." The court below evidently adopted this suggestion as justification for the rule. After citing with approval the rea-

soning of the Circuit Court of Appeals for the Sixth Circuit in *Midland Steel Products Co. v. National Labor Relations Board*, 113 F. (2d) 800,[18] the court said: "Unfortunately organization efforts often produce excitement and feeling among the employees, even exhibitions of violence" (R. 93). But this argument proves too much. It would serve equally well to justify prohibition not only of the distribution of union literature but of union discussion or solicitation, at any place, because such activities might cause so much hostility between employees as to interfere with their harmonious relations during working hours. What this argument really amounts to is that an employer should be permitted to ban any activity which might create differences of opinion among employees about joining a union or remaining aloof. The insubstantiality of the Company's fears that the distribution of union literature would "engender strife" and thus interfere with production is apparent in the light of the fact that the Company does not find it necessary or desirable to prohibit oral solicitation and discussion about unions on its premises, conduct which, on

[18] In the *Midland* case the court held that an employer's rule which prohibited union solicitation on plant premises during non-working as well as working hours was not violative of the Act. The court found justification for the rule in the alleged fact that, "Solicitation, argument, the hurling of epithets in tense discussion before work has been commenced or in the noon hour, may reasonably be expected to carry a certain animus over into work hours." 113 F. (2d) 800, 805-806.

the reasoning of the court below, would have at least as great a tendency to "produce excitement and feeling" (R. 93) among the employees as would the distribution of promotional literature. If oral discussion and solicitation for unions on the Company's premises does not result in manifestations of "feeling" or "violence" which interfere with production, it is difficult to understand how the dissemination of union literature could do so.

The instant case, as the Board pointed out (R. 40), "requires an evaluation of conflicting rights and policies—the employer's right to regulate the use of his own property, on the one hand, as against the employees' right to receive information to enable them to exercise their right to self-organization, which it is the policy of the Act to encourage." The Circuit Court of Appeals for the Second Circuit in discussing the analogous situation presented in the *Republic* case, said that it is for the Board to determine in such cases "(1) what in fact will be the prejudice to the interests of the employer in allowing [the particular union activity involved] to go on * * * and what will be the benefit to the employees; and what will be his benefit and their prejudice in disallowing it; (2) whether the benefit shall prevail over the prejudice, or vice versa" (142 F. (2d) 193, 196). And the court in that case properly recognized that "only in cases where [the reviewing courts] believe that there is no

reasonable warrant for the priority actually awarded" (*id.*) may the Board's order be set aside. The Board's conclusion in the instant case that the Company's rule, insofar as it conflicts with the statutory policy of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" (Section 1), must give way, was based, as we have shown above (*supra*, pp. 24–32), upon a careful appraisal of the prejudice to the employees and benefit to the employer which would flow from continued enforcement of the rule and of the possible prejudice to the employer and benefit to the employees which might result from its partial abrogation. In view of the Board's findings that no prejudice whatever would result to the Company from partial abrogation of the rule, whereas its continued enforcement would render self-organization among the Company's employees virtually impossible of attainment, the Board was clearly justified in awarding "priority" to the interests of the employees. Certainly it cannot be said that there is "no reasonable warrant" for the Board's conclusion; consequently, under the principles of judicial review applied by the Second Circuit, which, we submit, are entirely proper, the Board's decision should have been sustained.

The court below did not set aside as unsupported by the evidence, any of the Board's findings of fact concerning the repercussions of the

Company's rule upon the interests of the employees and of the employer. Nor did it hold that upon those findings the Board's conclusion, that protection of the statutory interests of the employees demanded abrogation of the rule to the extent directed by the Board's order, was unreasonable. Instead, unlike the Circuit Court of Appeals for the Second Circuit, it failed to accord any weight whatever to the Board's construction of the statute; it excluded as irrelevant any consideration of the extent to which the rule as applied deprived employees of practical opportunity to exercise the rights which the statute, in the public interest, conferred upon them; and it completely disregarded the Board's determination that under the circumstances here presented, on balance, the interests of the employees should prevail. The court below thereby disregarded the principle often enunciated by this Court that upon such questions "the experienced judgment of the Board is entitled to great weight." *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 682, 684; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 130–131; *Dobson* v. *Commissioner,* 320 U. S. 489, 500–501, and cases therein cited.

In place of the Board's considered approach, which gives effect to the language of the statute proscribing employer "interference" and at the same time recognizes that limitations upon self-organizational activities may at times be appro-

priate when such activities conflict with substantial, legitimate employer interests, the court below substituted its own rule—that an employer may insist "that the employees discuss and act in the matter of their own organization elsewhere than on the employer's property" (R. 93). The court's rule rests on the fallacious assumption that employees lose their rights under the Act when they enter the employer's property. As we have shown above (*supra*, pp. 18-20), the Board and the courts have uniformly held that an employer may not deny access to his property to union organizers and thereby block an essential avenue of communication between employees and those through whom they can make their statutory rights effective. And even the court below recognizes that an employer cannot lawfully insist "that the employees discuss and act in the matter of their own organization elsewhere than on the employer's property," if his motive in doing so is to discourage or impede self-organization. *National Labor Relations Board* v. *Peyton Packing Co.*, 142 F. (2d) 1009 (C. C. A. 5), certiorari denied, October 9, 1944, No. 298, this Term. Since the employer's motive, as we have demonstrated (*supra*, pp. 21–23), is not the decisive factor in determining whether conduct which interferes with full freedom of self-organization is violative of the Act, the right of employees to have access to information and advice necessary to enable them to exercise their rights under the Act cannot be

made to depend upon the employer's motive in denying such access to them.

The Company itself concedes that there must be some accommodation between its right to regulate the use of its property and the statutory rights of the employees, for it admits (Company's brief in the court below, 10; see also Tr. 219–221, 236–237) that a no-distributing rule, if applied to the entire six thousand acre tract of land, "might be too restrictive." Yet, under the rule applied by the court below, the Board would be powerless to find even such a rule violative of the Act. In sum, the theory adopted by the court below would permit any employer who controls the property on which his employees work and live to foreclose every avenue of communication of organizational information to and between his employees and thus effectively to preclude them from obtaining the benefits of the Act. So to construe the statute would frustrate attainment of its objectives in a large segment of American industry.

The same vices inhere in the approach of the Circuit Courts of Appeals for the Fifth, Sixth, Eighth, and Tenth Circuits to cases involving the validity of rules prohibiting union solicitation on an employer's property during non-working as well as working time. *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. (2d) 800, 805, 806 (C. C. A. 6); *National Labor Relations Board* v. *Williamson-Dickie Mfg. Co.*, 130 F. (2d) 260, 264, 267–268 (C. C. A. 5); *Carter*

Carburetor Corp. v. *National Labor Relations Board*, 140 F. (2d) 714, 716 (C. C. A. 8); *National Labor Relations Board* v. *Denver Tent & Awning Co.*, 138 F. (2d) 410, 411 (C. C. A. 10); *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. (2d) 423, 435 (C. C. A. 10). These courts adopt the view that no-solicitation rules cannot be found to violate the Act, no matter how serious their effect upon the exercise of self-organizational rights, if the rules are "reasonable."[19] They hold further that the "reasonableness" of such rules is a matter of law to be determined exclusively by the courts.[19] This is a usurpation of administrative functions (pp. 32–34, *supra*).

[19] This approach is exemplified by the opinion of the Sixth Circuit in the *Midland* case (113 F. (2d) at p. 805): "Since the rule was violated, the discharge was lawful unless the rule was unreasonable and hence null and void. * * * Whether this rule was reasonable is a question of law for the court to determine. *Little Rock & M. Rd. Co.* v. *Barry*, 8 Cir., 84 F. 944, 43 L. R. A. 349; *Missouri, K. & T. Ry. Co.* v. *Collier*, 8 Cir., 157 F. 347; *Chicago, R. I. & P. Ry. Co.* v. *Ship*, 8 Cir., 174 F. 353; *Central Rd. Co. of New Jersey* v. *Young*, 3 Cir., 200 F. 359, L. R. A. 1916E, 927."

It is noteworthy that the cases cited by the court to support the proposition that the "reasonableness" of employer rules is for the courts to determine did not arise under the Act. Obviously the question of whether court or jury is the proper tribunal to decide the "reasonableness" of working rules when these are challenged in a negligence action by an employee is entirely unrelated to the question whether, under the statutory scheme created by Congress, the Board or the court is the proper tribunal to decide whether an employer's rule which infringes rights guaranteed by the statute is "reasonable." The answer to the latter question is indicated by reference to Section 10 (e) of the Act and the applicable deci-

Moreover, in determining the reasonableness of such rules, these courts apply a different standard than that applied by the Board. They disregard the interests of employees which the Act protects, and determine "reasonableness" solely in relation to the alleged common law right of employers to control the use of their property and the conduct of their employees. Such an approach is no more appropriate in these cases than it was in the *Hearst* case, *supra*, or in *Securities & Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 87, 89, 90–92. As the Second Circuit pointed out in the *Republic* case (142 F. (2d) 193, 196), when a tribunal is called upon to determine questions of "reasonableness," which arise in many fields of the law, it "balances the interests against each other, and awards priority as seems to it just." But if courts exclude from consideration the statutory interest of employees in self organization, their finding that an employer's rule is "reasonable" could not be the product of a balancing of employer and employee interests but is simply a conclusion based on the erroneous premise that employees lose their statutory rights upon entering the employer's property. To assert that an employer has the power absolutely to prohibit self-organizational activities on factory grounds as an exercise of his plenary control over such

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sions of this Court cited above (p. 34), which, we submit, have been properly interpreted by the Circuit Court of Appeals for the Second Circuit in the *Republic* case.

property is as irreconcilable with the limitations imposed by the Act as is the analogous assertion by a municipality that "as an exercise of the city's plenary control of its streets * * * it has the power absolutely to prohibit the use of the streets for the communication of ideas" irreconcilable with the limitations imposed by the Constitution. *Jamison* v. *Texas*, 318 U. S. 413, 415–416. It is rather the Board's approach in these cases which comports with judicial standards, for, as in the instant case, a Board finding as to the reasonableness of an employer's rule rests not upon a disregard of the interests of one of the parties affected by its decision but upon a careful appraisal of the interests of both parties. In resolving whatever conflict exists between them, the Board seeks to accomplish "the greater good" (R. 40).

In support of its conclusion that an employer may lawfully prohibit all self-organizational activities on his premises, the court below stated that under Section 8 (2) of the Act an employer "cannot facilitate the organization [of his employees] even by providing a meeting place without incurring the charge that he is attempting to dominate it" (R. 93). If by this the court intended to imply that Section 8 (2) compelled the Company to prohibit the distribution of union literature on its parking lots the court we submit was clearly in error. It is true, of course, that an employer's grant to a labor organization of such valuable

facilities as a meeting place,[20] bulletin boards,[21] clerical[22] or legal services[22] and the like, con-

[20] *Matter of Berkshire Knitting Mills*, 46 N. L. R. B. 955, 977, enforced, 139 F. (2d) 134, 139 (C. C. A. 3), certiorari denied, 322 U. S. 747; *Matter of Cudahy Packing Co.*, 14 N. L. R. B. 302, 316, enforced, 118 F. (2d) 295 (C. C. A. 10); *Matter of Western Garment Mfg. Co.*, 10 N. L. R. B. 567, 570, 573; *Matter of J. Greenebaum Tanning Co.*, 25 N. L. R. B. 672, 675, 684, 685, enforced by consent, January 26, 1942 (C. C. A. 7); *Matter of Virginia Electric & Power Co.*, 44 N. L. R. B. 404, 415–418, 425, enforced, 319 U. S. 533; *Matter of Hancock Brick & Tile Co.*, 44 N. L. R. B. 920, 924; *Matter of Norfolk Shipbuilding & Drydock Corporation*, 12 N. L. R. B. 886, 891, 893, enforced, 109 F. (2d) 128, 129 (C. C. A. 4); *Matter of Houde Engineering Corp.*, 42 N. L. R. B. 713, 722, 725; *Matter of Carlisle Lumber Co.*, 2 N. L. R. B. 248, 270–271, enforced, 94 F. (2d) 138, 143 (C. C. A. 9), certiorari denied, 304 U. S. 575; *Matter of Lane Cotton Mills Co.*, 9 N. L. R. B. 952, 969–970, enforced, 111 F. (2d) 814, 816 (C. C. A. 5); *Matter of Bradford Dyeing Assn.*, 4 N. L. R. B. 604, 613–614, enforced, 310 U. S. 318, 335.

[21] *Matter of John A. Roebling's Sons Co.*, 17 N. L. R. B. 482, 499–500, enforced, 120 F. (2d) 289, 293 (C. C. A. 3); *Matter of Western Union Telegraph Co.*, 17 N. L. R. B. 34, 63, 137, enforced, 113 F. (2d) 992, 995 (C. C. A. 2); *Matter of General Motors Corp.*, 14 N. L. R. B. 113, 120–122, enforced, 116 F. (2d) 306, 308–309 (C. C. A. 7).

[22] *Matter of Calico Rope Works, Inc.*, 4 N. L. R. B. 1100, 1110; *Matter of Todd Shipyards Corp.*, 5 N. L. R. B. 20, 34–35; *Matter of M. Lowenstein & Sons, Inc.*, 6 N. L. R. B. 216, 232, order enforced by consent, October 24, 1938 (C. C. A. 2); *Matter of Union Die Casting Co.*, 7 N. L. R. B. 846, 851; *Matter of Lady Ester Lingerie Corp.*, 10 N. L. R. B. 518, 524; *Matter of Rath Packing Co.*, 14 N. L. R. B. 805, 813, enforced, 115 F. (2d) 217, 219 (C. C. A. 8).

[23] *Matter of Remington Rand, Inc.*, 2 N. L. R. B. 626, 732, enforced, 94 F. (2d) 862, 868, 869 (C. C. A. 2), certiorari

stitutes support within the meaning of Section 8 (2).[24] But the Board has never held that mere non-interference by an employer with union solicitation or with distribution of union literature on his premises *during non-working time* amounts to illegal support. Nor could an employer be suspected of attempting to dominate a labor organization simply because of his acquiescence in such activities. Findings that an employer has dominated a labor organization within the meaning of Section 8 (2) depend upon "the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act con-

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denied, 304 U. S. 576; *Matter of Kiddie Kover Mfg. Co.*, 6 N. L. R. B. 355, 362–364, enforced, 105 F. (2d) 179 (C. C. A. 6); *Matter of Industrial Rayon Corp.*, 7 N. L. R. B. 878, 890.

[24] The Board stated in its Seventh Annual Report, "It is an unfair labor practice * * * for employers * * * to aid the [labor] organization by supplying financial aid or the use of company facilities such as bulletin boards, mailing lists or office space." National Labor Relations Board, Seventh Annual Report (Gov't. Print. Off., 1943), p. 45. In its Third Annual Report the Board cited cases in which it found that by "furnishing financial aid and various facilities to employee organizations, such as the use of bulletin boards, mimeograph machines, the Company automobile, stenographic services and office space and mailing lists" employers had violated Section 8 (2) of the Act. National Labor Relations Board, Third Annual Report (Gov't. Print. Off., 1937), pp. 113–114, see also p. 115.

templates." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588. Such a finding must take into account the "whole congeries of facts" (*id.*) including "imponderable subtleties at work" which it is the Board's function to appraise. *National Labor Relations Board* v. *Virginia Electric & Power Company*, 314 U. S. 469, 479. Certainly, as this Court pointed out in the *Link-Belt* case, *supra*, "no one fact is conclusive."[25] Often, the grant of valuable facilities to a labor organization or the sanctioning of organizational activities on working time[26] is deemed by the Board an indication of employer favoritism

[25] Cf. Rosenfarb, *The National Labor Policy and How It Works* (1940), p. 115: "In virtually none of the cases have employer attempts at domination been along any single line of attack. Manifold activities have been resorted to to achieve this end. The Board, has, therefore, never had to decide as to the determinative effect of any one activity. In proceeding with the analysis of the ways and means of interference with company unions, the fact should not be lost sight of that the Board had dealt with them in a combination of circumstances."

[26] In determining whether a course of conduct constitutes a violation of Section 8 (2), "The Board has * * * considered the effects of employer's activities in permitting the conduct of organizational activities on the employer's premises during working hours with the consent of the employer." National Labor Relations Board, Third Annual Report (Gov't Print. Off., 1937), p. 113. See, for example, *Matter of Cudahy Packing Co.*, 17 N. L. R. B. 302, 317, 322-329, enforced, 118 F. (2d) 295 (C. C. A. 10) (circulation of union petition on working time); *Matter of Howe Scale Co.*, 47 N. L. R. B. 1399, 1403, 1413 (circulation of

toward a particular labor organization and as such an element of domination. Cf. H. Rep. 1147, 74th Cong., 1st Sess., pp. 18–19; *Matter of Berkshire Knitting Mills*, 46 N. L. R. B. 955, 977, enforced, 139 F. (2d) 134, 139–140 (C. C. A. 3), certiorari denied, 322 U. S. 747. But the normal inference of favoritism which arises from the grant of company time or facilities to a labor organization may be, and often is, rebutted by persuasive evidence of employer neutrality. For example, in *Matter of Mohawk Carpet Mills, Inc.*, 12 N. L. R. B. 1265, 1272–1273, the Board said:

> The fact that the respondent permitted solicitation of membership by the Amsterdam Union on company time would, ordinarily, be a strong circumstance indicating

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petitions, distribution of literature, solicitation, during working hours); *Matter of Todd Shipyards Corp.*, 5 N. L. R. B. 20, 34–35 (solicitation and meetings on company time); *Matter of H. J. Heinz Co.*, 10 N. L. R. B. 963, 970, 972, 973, 975, enforced, 311 U. S. 514 (solicitation during working hours); *Matter of West Kentucky Coal Co.*, 10 N. L. R. B. 88, 103, enforced, 116 F. (2d) 816 (C. C. A. 6) (circulation of membership cards during working hours); *Matter of Denver Automobile Dealers Ass'n.*, 10 N. L. R. B. 1173, 1204 (solicitation of members during working hours); *Matter of Hood Rubber Co., Inc.*, 14 N. L. R. B. 16, 24–33 (solicitation of members on company time); *Matter of Bradford Dyeing Assn.*, 4 N. L. R. B. 604, 612–614, enforced, 310 U. S. 318, 333–336 (circulation of membership cards during working hours); *Matter of Lane Cotton Mills Co.*, 9 N. L. R. B. 952, 989–790, enforced, 111 F. (2d) 814, 816 (C. C. A. 5) (meetings held during working hours).

> domination and interference with that organization. However, since the record shows that the T. W. O. C. [the charging union] was permitted like freedom in this regard, we cannot say that sponsorship and support of the Amsterdam Union are shown, within the meaning of the Act."

Normally, of course, the mere fact that an employer does not interfere with the solicitation of members on behalf of a labor organization during non-working time or with the distribution of union literature in a manner which does not impede production constitutes no evidence whatever of favoritism toward the labor organization involved, and we are aware of no case in which the Board has held to the contrary. Only if the employer interferes with the similar activities of a competing labor organization, or himself instigates the organizational activities, or affirmatively cooperates with a labor organization to increase the effectiveness of its proselytizing techniques by lending to them an appearance of employer sponsorship does his conduct take on the color of illegality.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision below should be reversed

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[11] Accord: *Matter of Ranco, Inc.*, 57 N. L. R. B. 425; *Matter of Poultry Producers of Central California*, 25 N. L. R. B. 347, 359.

and the cause remanded with directions to enforce the Board's order in full.

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APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

SEC. 1.

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * *

SEC. 10.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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